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Following Suit With the Second Circuit: Defining Gambling in the Illegal Gambling Business Act

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Following Suit with the Second Circuit

DEFINING GAMBLING IN THE ILLEGAL GAMBLING BUSINESS ACT

INTRODUCTION

The federal government's involvement in the regulation of gambling has been a demonstration of the principles of federalism. For the most part, the federal government has recognized that gambling is an area of law left to the prerogatives of the states.[1] Absent the influence of federal law, state gambling law has developed to be extremely varied, not just from state to state, but from game to game within a state.[2] Much of that variety is due to differing definitions of gambling, and how large a role chance, as opposed to skill, takes in gambling. The federal government has regulated gambling but it has not inserted itself into substantively defining gambling. Rather, the federal government has intervened when states have inadequately enforced their own laws.[3] The overarching federal policy on gambling is to aid the states in enforcing what they define as gambling, rather than the federal government determining its own definition of gambling.[4] This note argues that the Illegal Gambling Business Act (IGBA) should be read in light of this federal policy.

The IGBA prohibits "conduct[ing], financ[ing], manag[ing], supervis[ing], direct[ing], or own[ing] all or part of an illegal gambling business."[5] The statute then continues to define what constitutes an illegal gambling business in § 1955(b)(1), which enumerates three elements:

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[1] G. Robert Blakey & Harold A. Kurland, *The Development of the Federal Law of Gambling*, 63 CORNELL L. REV. 923, 925 (1978) (citing COMM'N ON THE REVIEW OF THE NAT'L POL'Y TOWARD GAMBLING, GAMBLING IN AMERICA 1, 5 (1976)).

[2] *See infra* Part I.

[3] *See* Blakey & Kurland, *supra* note 1, at 926; 116 CONG. REC. 591 (1970) (statement of Sen. McClellan).

[4] Blakey & Kurland, *supra* note 1, at 925; S. REP. No. 91-617, at 74 (1969); *see also infra* Parts II–III.

[5] 18 U.S.C. § 1955(a) (2012).

> (1) "illegal gambling business" means a gambling business which—
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> (i) is a violation of the law of a State or political subdivision in which it is conducted;
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> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
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> (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.[6]

A recent decision by the U.S. District Court for the Eastern District of New York, *United States v. Dicristina*, rejected the argument that the definition of an illegal gambling business is limited to the elements listed in § 1955(b)(1).[7] The court in *Dicristina* held that § 1955(b)(2) added a fourth element to the crime. Section 1955(b)(2), which reads, reads "'gambling' includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein," added a fourth element to the crime.[8] The court interpreted § 1955(b)(2) as requiring the government to prove that in the type of game played (in this case Texas Hold 'Em), chance predominated over skill.[9] In other words, in addition to the type of game violating state law, the game also had to fulfill the federal definition of gambling gleaned from § 1955(b)(2), that chance predominates skill, in order to prove a violation of § 1955. The court's extensive statutory interpretation analysis found the plain language and legislative history to be inconclusive regarding the meaning of § 1955(b)(2) and held that, due to the rule of lenity, the defendant's narrower interpretation must prevail.[10] The court dismissed the indictment, holding that skill predominated over chance in Texas Hold 'Em.[11]

The Second Circuit overruled the district court's reading that § 1955(b)(2) constitutes a fourth element and held that to be guilty of operating a gambling business in violation of federal

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[6] *Id.* § 1955(b).

[7] United States v. Dicristina, 886 F. Supp. 2d 164, 235 (E.D.N.Y. 2012), *rev'd* 726 F.3d 92 (2d Cir. 2013).

[8] *Id.* at 224-25, 231; 18 U.S.C. § 1955(b)(2).

[9] *Dicristina*, 886 F. Supp. 2d at 231. This is in addition to proving that the game violates state law, which may adopt a test other than the predominance test.

[10] *Id.* at 235. "[T]he rule of lenity requires that ambiguous criminal laws be interpreted in favor of the defendants subjected to them." *Id.* at 200 (internal citations omitted).

[11] *Id.*

law, the prosecution only has to prove the three elements articulated in § 1955(b)(1).[12] The Second Circuit relied on the plain meaning of the statute, reading § 1955(b)(2)'s phrase "including but not limited to" as introducing a non-exhaustive list of the types of gambling businesses that violated § 1955, and not as substantively defining gambling.[13] The court also reasoned that this reading of the plain language of the statute was bolstered by the legislative history, which was concerned with reaching gambling businesses of a certain size and character, rather than with prohibiting certain types of games.[14] The Second Circuit held that the rule of lenity did not apply because the meaning of the statute was unambiguous.[15] It reversed the judgment of acquittal and remanded for a reinstatement of the jury verdict.[16]

United States v. Dicristina is the first case where a court analyzed § 1955(b)(2) in depth. Following the district court decision in *Dicristina*, the District Court of Guam declined to interpret § 1955(b)(2) as containing a fourth element of the crime for many of the same reasons enunciated in the Second Circuit's opinion.[17] Prior to *Dicristina*, other courts hearing cases regarding a prosecution under § 1955 assumed, with little or no analysis, that the definition of an "illegal gambling business" consisted of only those elements listed in § 1955(b)(1).[18] This note argues that the elements listed in § 1955(b)(1) are the complete definition of "illegal gambling business," and whether a certain type of game constitutes gambling under that statute should be determined solely by state law. Courts should follow suit with the Second Circuit's reading of § 1955(b)(2), which is

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[12] United States v. Dicristina, 726 F.3d 92, 102 (2d Cir. 2013).

[13] *Id.* at 98-100. The court distinguished between the use of "including but not limited to" and of "means," which is used elsewhere in the statute to define terms. It also pointed out that § 1955(e)'s language defining games of chance could have been used in § 1955(b)(2) if Congress so desired, and that there is no evidence § 1955(e) was intended to modify § 1955(b)(2). *Id.*

[14] *Id.* at 102-04.

[15] *Id.* at 104-05.

[16] *Id.* at 106.

[17] *See* United States v. Hsieh, No. 11-00082, 2013 WL 1499520, at *4 (D. Guam, Apr. 12, 2013).

[18] *See, e.g.*, United States v. Atiyeh, 402 F.3d 354, 372 (3d Cir. 2005). Unlike the cases that follow, this case did address the argument made in *Dicristina*. The Third Circuit found that a violation of § 1955 included conducting a gambling business as defined by the three elements in § 1955(b)(1), as distinguished from the definition of gambling provided in § 1955(b)(2). The court's discussion, however, did not extend beyond this distinction, and the argument was not analyzed in depth. Other cases include United States v. Gotti, 459 F.3d 296, 340 (2d Cir. 2006); United States v. Truesdale, 152 F.3d 443, 446 (5th Cir. 1998); United States v. Cyprian, 23 F.3d 1189, 1199 n.14 (7th Cir. 1994); United States v. Sacco, 491 F.2d 995, 998 (9th Cir. 1974) (en banc).

consistent with the history of federal involvement in gambling. The historical practice of the federal government has been to defer to state law definitions of gambling, and the IGBA should be read in accordance with that practice.

Part I illustrates the variety among state law definitions of gambling through a case study of the popular poker game variant Texas Hold 'Em. Demonstrating that variety in Part I supports the arguments in Parts II and III, that Congress recognized and intended to defer to the states' varying definitions of gambling. The background of the varying definitions of gambling also explain why the IGBA's legislative history, which is devoid of any mention of the definition of gambling, should not be read to adopt one of those definitions. Part II explores the role of the federal government in gambling throughout American history, and argues that the federal government only legislates when the states cannot adequately implement their own gambling policies, and only seeks to prohibit gambling which is illegal as defined by state, not federal, law. Part III analyzes the legislative history of the IGBA, which was a part of the Organized Crime Control Act of 1970, and argues that the IGBA continued the federal tradition of aiding the states' gambling enforcement only where the states cannot enforce their own law. It should not be read as indicating the federal government's concern about which types of games are prohibited in a distinct federal definition of gambling. This part analyzes the language of § 1955 with the aim of showing that the statute deferred to state definitions of gambling without adding a new element in § 1955(b)(2).

I. THE VARIANCE IN STATE LAW DEFINITIONS OF GAMBLING, AS DEMONSTRATED BY THE POKER GAME VARIANT TEXAS HOLD 'EM

Poker has a long and storied history in America. It first appeared in the United States in the early nineteenth century in the port of New Orleans.[19] The game then quickly spread by

[19] Poker is believed to have been brought by the French settled in New Orleans, and derived from a French card game called poque. It is believed that poker also derives from the card games Bouilotte, Poch (also known as Pochen or Pochspeil), As-Nas, and Brag. The name 'poker' is most likely derived from non-French speaking Americans mispronouncing Poque. *See* Anthony Cabot & Robert Hannum, *Poker: Public Policy, Law, Mathematics, and the Future of an American Tradition*, 22 T. M. COOLEY L. REV. 443, 447-50 (2005); David Parlett, *A History of Poker*, PAGAT (Dec. 23, 2010), http://www.pagat.com/poker/history.html.

way of riverboats travelling the Mississippi River.[20] Poker flourished in the western frontier states, especially in Texas.[21] By the end of the nineteenth century, poker's popularity had increased to the point where one reporter questioned whether it had supplanted baseball as "the national game."[22] By that time it was no longer "confined to the rough South-west"[23] and was even played among senators.[24] Poker continues to grow in popularity today, attracting more players with the accessibility of online poker. In addition, poker has become a spectator event that reaches wider audiences than ever with the advent of the televised broadcasting of major poker tournaments.[25]

Despite the consistent popularity of the game, commercialized poker today remains illegal in the majority of states.[26] Of the states that do not ban poker in all forms, the law

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[20] Cabot & Hannum, *supra* note 19, at 448. For a colorful account of the widespread cheating that occurred on Mississippi riverboats, *see* DES WILSON, GHOSTS AT THE TABLE: RIVERBOAT GAMBLERS, TEXAS ROUNDERS, INTERNET GAMERS, AND THE LIVING LEGENDS WHO MADE POKER WHAT IT IS TODAY 57-67 (2008).

[21] WILSON, *supra* note 20, at 25-56, 71-119 (giving accounts of some of the stories and characters associated with poker in the West and in Texas).

[22] *The National Game*, N.Y. TIMES, Feb. 12, 1875, *available at* http://query.nytimes.com/mem/archive-free/pdf?res=9B02EED6173DE43BBC4A52DFB466838E669FDE. It should be noted that the article's author does acknowledge that people may disagree with this point, believing that people are uninformed about poker. *Id.* The article argues, however, that the proliferation of literature about the rules of poker shows otherwise, and that "those of us who yet remain in ignorance of the subject . . . are in danger of being classed as old fogies." *Id.*

[23] *Id.*

[24] *Poker Players Among Senators*, N.Y. TIMES, Mar. 23, 1884, *available at* http://query.nytimes.com/gst/abstract.html?res=9C02E7DA1238E033A25750C2A9659C94659FD7CF ("Nearly all the Southern Senators enjoy a sit-down [poker game] occasionally for just enough stakes to make the play interesting.").

[25] The World Series of Poker is broadcast on ESPN, the World Poker Tour on the Travel Channel, and the Poker Superstar series on FSN, to name a few. Richard Sandomir, *Poker's Popularity Doesn't Appear Ready to Fold*, N.Y. TIMES (July 12, 2005), http://www.nytimes.com/2005/07/12/sports/othersports/12sandomir.html?_rmoc.semityn.www=&sq=world%20series%20of%20poker&st=nyt&scp=4&pagewanted=print.

[26] This is as opposed to social poker. Thirty-nine states have not legalized commercial casinos, but this figure does not include states where there are casinos on tribal lands, nor states where poker itself (but not commercial casinos) is legal, with certain restrictions. JOHN LYMAN MASON & MICHAEL NELSON, GOVERNING GAMBLING 46 (2001). For example, in its constitution, California prohibits commercial casinos but allows the Governor to conclude compacts with Indian tribes authorizing them to run casinos on tribal lands. CAL. CONST. art. IV, § 19. While California does not permit casinos on non-tribal land, it does allow local governments to license cardrooms, within certain limitations. I. Nelson Rose, *When Is Poker Legal?*, GAMBLING AND THE LAW (2005), http://www.gamblingandthelaw.com/index.php/columns/108-when-is-poker-legal.html.
Also note that now the 39 state figure needs updating, as New Yorkers have recently voted to amend their state constitution to allow casinos outside of New York City. Glenn Blain, *New York Voters Approve 7 Las Vegas-Style Casinos*, DAILY NEWS (Nov. 6, 2013 12:33 AM), http://www.nydailynews.com/news/election/n-y-voters-approve-7-las-vegas-style-casinos-article-1.1508030.

varies widely. Some states, such as Montana[27] and Florida,[28] allow poker but keep it under stringent restrictions. In California, poker is legal under state law, leaving local governments to determine whether to license cardrooms.[29] In the more well-known legalized gambling cities, such as Las Vegas and Atlantic City, the states have taken different approaches. Poker is legal throughout the state of Nevada, while New Jersey has confined the game's legality to Atlantic City.[30] Six states, mostly those on the Mississippi River, have legalized riverboat casinos.[31] Many states, for example Kentucky and New Hampshire, allow poker games to run for the benefit of charities and nonprofit organizations, subject to certain regulations.[32] Despite these exceptions, the game of poker is prohibited by most states. There are arguments, though, that under the various common law tests of those states, poker could be legal.[33]

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[27] *See* Montana Card Games Act of 1974, MONT. CODE ANN. §§ 23-5-306 to 23-5-332. (West 2013). Poker is an authorized card game, *id.* at § 311, but is subject to restrictions contained in the rest of the Act, such as the permits needed to conduct games *id.* at § 306, licenses required for poker dealers, *id.* at § 308, a restriction on the hours of play, *id.* at § 307, a limit of $300 on prize money, *id.* at § 312, and special rules covering tournaments, *id.* at § 317.

[28] *See* FLA. STAT. ANN. § 849.085 (West 2013), which allows penny-ante games of poker held in a person's dwelling in which the winnings do not exceed $10 per hand. Section 849.086 allows the licensing of cardrooms subject to restrictions as set by that statute and by The Division of Pari-mutuel Wagering of the Department of Business and Professional Regulation. FLA. STAT. ANN. § 849.06.

[29] Rose, *supra* note 26. California has an interesting history with poker; "stud-horse poker" was made illegal by statute in 1885, but that language was repealed from the statute in 1991, in part because no one knew what "stud-horse poker" was. Bennett M. Liebman, *Poker Flops Under New York Law*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 22-28 (2006–2007). Those games that are not specifically prohibited by state statute, as no form of poker currently is, can be prohibited or regulated by localities without being in conflict with or preempted by state law. *Id.*

[30] MASON & NELSON, *supra* note 26, at 32-33. Nevada is the only state to have legalized commercial casinos throughout the entire state. *Id.* Other states that have followed New Jersey's lead in limiting legalized commercial casinos to specified geographic areas include Michigan in Detroit, Colorado in three cities, and South Dakota in Deadwood. *Id.* at 39. Deadwood is a tourist attraction for those wishing to see where Wild Bill Hickok was allegedly shot while holding what came to be known as the "dead man's hand," two pair, aces, and eights. *See* WILSON, *supra* note 20, at 3-23 (2008).

[31] These six states are Iowa, Illinois, Indiana, Mississippi, Louisiana, and Missouri. Indiana has water-based casinos on the Ohio River and Lake Michigan, while the other five states have riverboat casinos on the Mississippi River. MASON & NELSON, *supra* note 26, at 36-9; Ronald J. Rychlak, *The Introduction of Casino Gambling: Public Policy and the Law*, 64 MISS. L. J. 291, 304 n.77 (1994–1995). For an in-depth discussion of Mississippi riverboat casinos, see Rychlak at 305-11.

[32] Rose, *supra* note 26.

[33] The different common law tests focus on the main issue of whether a game is one of skill or chance. Many argue that poker is a game of skill and therefore under some of the common law tests, is legal. Both the different types of common law tests, and the issue of whether poker is a game of skill or of chance, will be discussed later in this note.

A. The Legal Significance of Skill in State Law

There is great statutory and common law variance among the states regarding the regulation of poker and other forms of gambling. States have differing regulatory schemes for gambling, and they employ different common law tests to determine whether games are a legal one of skill or an illegal game of chance. Because the state law is so varied, it makes sense that in the IGBA, Congress intended to defer to state law definitions of gambling, and not supplement them with a new, federal definition of gambling.

Whether games such as poker are categorized as a game of skill or one of chance has legal significance in determining whether the game is legal under state law. The Supreme Court has defined a lottery as having three elements: consideration, distribution of a prize, and distribution of that prize according to chance.[34] Although the Supreme Court was addressing the elements of a "lottery, gift enterprise, or similar scheme,"[35] these three elements also constitute the common law definition of gambling in general.[36] The consideration element requires that something of value, such as money or property, be given up for a chance to win a prize.[37] The expenditure of time and effort can fulfill the consideration requirement, but the amount of time and effort that must be expended varies among jurisdictions.[38] The prize element requires the chance that participants win something of value.[39] The prize does not have to be monetary and it does not have to have a value greater than that of the consideration given.[40] The last element, chance, is defined differently in different jurisdictions.

The distinction between games of skill and games of chance was recognized long ago. Historically, governments have justified permitting games of skill to encourage their

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[34] Fed. Commc'ns Comm'n v. Am. Broad. Co., 347 U.S. 284, 290 (1954).

[35] *Id.* (internal quotation marks omitted).

[36] I. NELSON ROSE, GAMBLING AND THE LAW 77 (1986); J. Royce Fichtner, *Carnival Games: Walking the Line Between Illegal Gambling and Amusement*, 60 DRAKE L. REV. 41, 45 (2011–2012) ("While there was once a practical difference between the use of the terms 'gambling' and 'lotteries,' any line of demarcation between the two terms has disappeared. . . . If all three elements—consideration, prize, and chance—are present, the activity constitutes gambling.").

[37] Fichtner, *supra* note 36, at 46.

[38] *Id.* at 46-47; ROSE, *supra* note 36, at 77-79. For example, the Supreme Court in *Fed. Commc'ns Comm'n v. Am. Broad. Co.* held that the consideration of expending effort by listening to the radio station in order for a chance to win the prize was insufficient to fulfill the element of consideration. 347 U.S. at 294.

[39] Fichtner, *supra* note 36, at 47.

[40] *Id.*

citizens to develop and perfect skills that were considered of merit.[41] There are games that are seen as pure skill, such as chess (even though there is an element of chance in deciding who moves first), and those on the other end of the spectrum that are considered games of pure chance, such as bingo.[42] There are a large number of games that fall in the middle of the spectrum somewhere between skill and chance, and it is in this gray area where courts employ different legal tests to determine whether the game is prohibited by law.

When there is a game of mixed skill and chance, one test a state court might employ is what has come to be known as the "pure chance" test.[43] The pure chance test considers whether the participants in the game can influence the outcome of that game by their skill.[44] If they can, then the game is one of skill and is legal.[45] Under this approach, it is immaterial to what extent skill has influenced the outcome, so long as it played a part in determining it.[46] Modern American courts have largely rejected the pure chance test.[47] A few states have even adopted a rule, called the "any chance" test, which is the opposite of the pure chance test. Under the any chance test, if the outcome is determined in any measure by chance, it is considered gambling.[48]

The majority of American courts determine whether a game is one of skill or chance using the predominance test, alternatively known as the dominant factor test.[49] This test considers whether skill or chance predominates in the game in question.[50] The test focuses on the influence of skill on the outcome of the game, not whether it is "just one part of the

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[41] *Id.* at 48-49 (quoting Corp. Org. & Audit Co. v. Hodges, 47 App. D.C. 460, 466 (D.C. Cir. 1918)); Anthony N. Cabot, Glenn J. Light & Karl F. Rutledge, *Alex Rodriguez, A Monkey, and the Game of Scrabble: The Hazard of Using Illogic to Define the Legality of Games of Mixed Skill and Chance*, 57 DRAKE L. REV. 383, 389 (2008–2009) For example, ancient Roman societies encouraged martial games among young men to practice the skills they would use as future soldiers, and Islamic law's prohibition on gambling did not extend to wagers on horse racing because training horses was useful for war.

[42] Fichtner, *supra* note 36, at 49.

[43] *Id.* (citing Secretary of State v. St. Augustine Church, 766 S.W.2d 49 (Tenn. 1989)).

[44] Liebman, *supra* note 29, at 8.

[45] *Id.*

[46] Fichtner, *supra* note 36, at 49.

[47] *Id.* at 50.

[48] Anthony N. Cabot & Louis V. Csoka, *Fantasy Sports: One Form of Mainstream Wagering in the United States*, 40 J. MARSHALL L. REV. 1195, 1205 (2007).

[49] Cabot, Light & Rutledge, *supra* note 41, at 390.

[50] *Id.* at 390-92.

larger scheme."[51] Some of the factors courts may consider as evidence that the game is one of skill include whether: a skillful player would, in the long-term, win more often than an unskillful player; skill can be learned from experience and/or from acquiring more knowledge by reading; knowledge of mathematics is useful in the game; knowledge of psychology in games played against other competitors can help influence the actions of others; player participation influences the outcome of the game.[52] Some courts also consider the pool of participants, analyzing whether the people who are likely to participate in the game actually possess the skill to influence the outcome of the game, rather than whether a small class of experts would be able to do so.[53]

In applying the predominance test, courts have differed over whether poker is a game of skill or chance.[54] Courts in Illinois,[55] Nebraska,[56] North Carolina,[57] Massachusetts,[58] and Utah[59] have held that poker is a game of chance.[60] In contrast,

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[51] Morrow v. State, 511 P.2d 127, 129 (Alaska 1973) (citing Commonwealth v. Plissner, 4 N.E.2d 241 (Mass. 1936)).

[52] ROSE, *supra* note 36, at 80-81.

[53] *See* Fichtner, *supra* note 36, at 51-53, & n.73 (listing cases).

[54] Cabot & Hannum, *supra* note 19, at 459. In some jurisdictions, the question of whether a game is one of skill or one of chance is treated as a question of fact for the fact finder, while in other jurisdictions it is a question of law for the judge. *Compare* People v. Mitchell, 444 N.E.2d 1153, 1155 (Ill. App. Ct. 1983) (upholding jury's finding that games of poker are not "bona fide contests for the determination of skill"), *with* Bell Gardens Bicycle Club v. Dep't of Justice, Cal. Rptr. 2d 730, 750-51 (Cal. Ct. App. 1995) (treating jackpot poker as a game of chance).

[55] *Mitchell*, 444 N.E.2d at 1153, 1155 (upholding jury's finding that games of poker are not "bona fide contests for the determination of skill").

[56] Indoor Recreation Enters., Inc. v. Douglas, 235 N.W.2d 398, 400-02 (Neb. 1975) (holding, using a predominance test, that both poker and bridge are games of chance). After *Indoor Recreation*, the Nebraska legislature changed the language of the applicable statute. Am. Amusements Co. v. Neb. Dept. of Revenue, 807 N.W.2d 492, 500-01 (Neb. 2011). However, the Supreme Court of Nebraska has held that the new language simply "rewords the predominance standard," rather than change the test. *Id.* at 500-02. Because the test has not been changed, it seems that *Indoor Recreation* remains good law.

[57] State v. McHone, 90 S.E.2d 539, 540 (N.C. 1955) (upholding jury conviction of defendant who allowed a game of chance, poker, to be played and wagered on his property).

[58] Chapin v. Haley, 133 Mass. 127 (1882) (upholding jury verdict convicting defendant, when the jury was charged that one of the elements required for a guilty verdict was a finding that draw poker was a game of chance). *But see* Commonwealth v. Club Caravan, Inc., 571 N.E.2d 405, 406 (Mass. App. 1991) (holding that, as a matter of law, video poker machines involved an element of skill, although not as much skill as live poker, that made the machines legal under the statute).

[59] Collet v. Beutler, 76 P. 707 (Utah 1904) (refusing to recognize a debt because it was a gambling debt borrowed to play poker, a game of chance. The court wrote that the trial court should have directed the criminal law be enforced against these parties.).

[60] Cabot & Hannum, *supra* note 19, at 462; Liebman, *supra* note 29, at 19-21.

courts in California,[61] Oregon,[62] and Washington[63] have held that poker is a game of skill. Some states retain a distinction between games prohibited as a lottery (a game of chance) and those prohibited as gambling; therefore, some games could be considered not a lottery (and therefore a legal game of skill), but still prohibited or otherwise regulated as gambling.[64]

A minority of states employ a test similar to the predominance test, though more stringent, known as the material element test.[65] Under this test, if chance is a material element (meaning it is more than incidental) in determining the outcome of the game, that game is considered gambling, even if skill predominates.[66] Eight states—Alabama, Alaska, Hawaii, Missouri, New Jersey, New York, Oklahoma, and Oregon—adopt the material element test.[67] Applying this test, New York courts have held that poker is a game of chance.[68]

A few states have their own unique approaches to determining whether a game is one of skill or of chance. Ohio statutorily defines poker, as well as craps and roulette (but not bingo), as a game of chance.[69] Texas prohibits playing for money in "any game played with cards" regardless of whether the game is one of skill or chance.[70] In Texas there are a few available defenses to a charged violation, including one that requires the defendant to prove that the "gambling [was] in a private place," that no one "received any economic benefit other than personal winnings" and that "except for the advantage of

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[61] Bell Gardens Bicycle v. Dep't of Justice, 42 Cal. Rptr. 2d 730, 750-51 (Cal. Ct. App. 1995) (1995) (holding that jackpot poker is a game of chance where skill does not play the same role as it does in regular draw poker). Recall that California has a unique situation, in which certain enumerated games are prohibited by state statute (of which stud-horse used to be, but is no longer one), and other gambling games (including poker) may be prohibited or regulated as a locality so chooses without being in conflict with the state law. *See* Liebman, *supra* note 29, at 23-27.

[62] State v. Coats, 74 P.2d 1102, 1106 (Or. 1938) (stating, albeit in dicta, that poker is not a lottery because it is a game of skill, even though it is prohibited as a gambling game).

[63] State *ex rel.* Schillberg v. Barnett, 488 P.2d 255, 257-58 (Wash. 1971) (en banc) (holding that poker is not a game of chance for the purposes of a prohibited lottery, but that poker is a gambling game prohibited in the state's criminal law). Though the definitions of lottery and gambling in many jurisdictions are the same, some jurisdictions have retained the distinction.

[64] *See, e.g.*, *Coats*, 74 P.2d at 1106; *Barnett*, 488 P.2d at 257-58.

[65] Cabot, Light & Rutledge, *supra* note 41, at 392-93.

[66] *Id.*

[67] *Id.* at 392, n.64.

[68] *See* People v. Turner, 629 N.Y.S.2d 661, 662 (Crim. Ct. 1995) (explaining New York's material element test); United States v. Dicristina, 886 F. Supp. 2d 164, 169 (E.D.N.Y. 2012) (listing New York cases that have held poker is a game of chance), *rev'd*, 726 F.3d 92 (2d Cir. 2013).

[69] OHIO REV. CODE ANN. § 2915.01(D) (West 2013).

[70] TEX. PENAL CODE ANN. § 47.02(a)(3) (West 2013).

skill or luck, the risks of losing and the chances of winning were the same for all participants."[71]

For the purposes of this note, the significance of the different state law tests and their applications is not so much in their substance, but rather in their variety. Given this variety, it makes sense that the IGBA defined gambling solely by reference to state law and did not create an additional, federal element to supplement these tests in § 1955(b)(2). It is also significant that even states who employ the same test have reached different results, even further counseling Congress' deference to state law. This stance is bolstered by the fact that, while there are many possible definitions of chance in gambling, Congress did not debate any of these definitions when discussing the IGBA.[72]

B. The History and Rules of Texas Hold 'Em

There are many different types of poker, but none are more popular today than Texas Hold 'Em.[73] That popularity is due in large part to the fact that No Limit Texas Hold 'Em is the main event in the World Series of Poker. The World Series of Poker started in 1970 in Benny Binion's Horseshoe Casino as a chance for some of the biggest names in poker to play each other in a high-stakes game.[74] Since then, the event has grown into a spectacle with thousands of competitors, 61 different tournaments, and a $1 million dollar buy-in for the 2012 main event.[75] In the 21st century, the advent of online poker further increased the accessibility and popularity of Texas Hold 'Em to amateurs, and poker tours featuring Texas Hold 'Em continue to attract players and viewers alike.[76] The increasing popularity of poker has led organizations, such as the Poker

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[71] *Id.*§ 47.02(b).

[72] *See infra* Parts III.B–C.

[73] Liebman, *supra* note 29, at 5 (citing JOHN SCARNE, SCARNE'S GUIDE TO MODERN POKER 14 (1980)).

[74] WILSON, *supra* note 20, at 175-76. This game grew out of one held the year before, called the "Texas Gamblers Reunion," which included the same cast of characters. *Id.* Tom Moore had suggested to Binion that they make it an annual game to crown a world champion. *Id.* The first champion, Johnny Moss, was elected by a vote of the players in 1970. *Id.*

[75] World Series of Poker, *A Numbers Game – 2012 WSOP Main Event*, *available at* http://www.wsop.com/2012/BY-THE-NUMBERS-2012-WSOP-MAIN-EVENT.pdf (last visited Jan. 27, 2014).; World Series of Poker, *Fact Sheet – The Big One for the One Drop*, *available at* http://www.wsop.com/2012/thebigone/files/BIGONE_FACTSHEET.pdf (last visited Jan. 27, 2014).

[76] Liz Benston, *TV Fans Go All-In on Poker*, LAS VEGAS SUN (June 25, 2006, 7:50 AM), http://www.lasvegassun.com/news/2006/jun/25/tv-fans-go-all-in-on-poker/.

Players Alliance, to advocate for the legalization of poker. The Poker Players Alliance is a nonprofit organization that lobbies Congress and state legislatures for laws favorable to poker and files amicus briefs in cases regarding poker.[77]

Texas Hold 'Em is a non-house banked game, meaning that the dealer does not play and the house does not have a stake in the outcome.[78] Rather, players are competing only for each other's money.[79] In Texas Hold 'Em, each individual player is dealt two pocket, or hole, cards. These cards will be combined with the five community cards, which are shared and available for all the players to use, in order for the players to create the best five-card hand possible.

The community cards are revealed in a staggered manner, which offers players multiple opportunities to make decisions on how to bet. Before pocket cards are dealt, the player to the left of the dealer button must bet the small blind, and second to the left must bet the big blind.[80] After the hole cards are dealt, but before any community cards are dealt, there will be the first round of betting (pre-flop); betting occurs sequentially in a clockwise-fashion. At this time, a player has the option on his or her turn to either call or raise the bet, or to fold the hand.[81] When each player has either called or folded, the dealer deals three cards face up (unless, of course, only one player remains), known as the flop. This is followed by a second round of betting, and then the fourth card, known as the turn. And then there is a third round of betting, followed by the fifth card, known as the river.

Once all the community cards have been revealed, there is one final round of betting. If two or more players remain in the game, there is a showdown and the player with the highest

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[77] *Mission Statement*, POKER PLAYERS ALLIANCE, http://theppa.org/about/mission/ (last visited Oct. 26, 2013). The PPA filed an amicus brief in *United States v. Dicristina*. *See* Memorandum of Law of *Amicus Curiae* the Poker Players Alliance in Support of Defendant Lawrence Dicristina's Motion to Dismiss Superseding Indictment, United States v. Dicristina, 886 F. Supp. 2d 164 (E.D.N.Y. 2012), *rev'd* 726 F.3d 92 (2d Cir. 2013).

[78] The house usually makes its money either by a rake from the pot, typically 5% to 10%, though some may charge an hourly fee or a flat rate per hand. *See Dicristina*, 886 F. Supp. 2d at 173 (quoting Cabot & Hannam, *supra* note 19 at 452-53).

[79] *Id.*

[80] The dealer button will rotate clockwise after each hand, thereby rotating who has the mandatory small and big blinds, as well as the order of betting in the betting rounds. The big blind is usually double the amount of the small, and is the minimum bet allowed in the game. *Id.* at 172; WILSON, *supra* note 20, at 326.

[81] Another way you can play Texas Hold 'Em is to have an ante from all players in lieu of blinds. In games played under these rules there is the additional option of checking.

hand wins. Who wins the showdown is determined by the hierarchy of hands.[82] In the event of a tie, the winner is determined by the kickers, the highest cards in the player's five-card hand other than the cards already used to make the significant part of the hand (the pair, for instance). If there is still a tie after considering the kickers (for instance, when the players have the same kickers because the highest cards are the ones on the board), the players will split the pot. Many hands of poker never make it to the showdown because all but one player has already folded. In these cases the winner is not required to show his or her hand.[83]

C. The Skill Employed in Texas Hold 'Em

Texas Hold 'Em can be used as an example to illustrate why states can vary widely in their determinations of whether a specific game is legal, even if they adopt the same legal standard regarding the element of chance. Even using the same legal standard for chance, there are valid arguments supporting both that poker is a game of skill and one of chance. Some argue that it is a game of chance because which cards are dealt is a chance occurrence. Others argue that poker is a game of skill. During a poker game, players utilize several different skill sets and make numerous strategic choices: bluffing, opponent modeling, unpredictability, betting strategies, risk and money management, psychology, and calculating probabilities of certain cards being dealt or certain hands being made.[84] Because of the numerous choices being made, and because poker is a game of incomplete information, it has been used in research for computer science and artificial intelligence.[85]

One study shows that 75.7% of the sampled 103 million hands ended before showdown.[86] The same study also found

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[82] For a more detailed discussion of hand rankings in the context of Texas Hold 'Em, complete with illustrations, see SAM BRAIDS, THE INTELLIGENT GUIDE TO TEXAS HOLD 'EM 6-10 (2d ed. 2010).

[83] Of course those who fold do not show their hands either. For the basic rules of the game, see *Dicristina*, 886 F. Supp. 2d at 172-73; WILSON, *supra* note 20, at 326-27; or one of the many books on how to play Texas Hold 'Em, such as BRAIDS, *supra* note 82, at 5-10.

[84] This list is not intended to be all-inclusive. *See Dicristina*, 886 F. Supp. 2d at 173-76; Cabot & Hannum, *supra* note 19, at 467-83; Noga Alon, Poker, Chance, and Skill, 5-13 (unpublished manuscript), *available at* http://www.tau.ac.il/~nogaa/PDFS/skill4.pdf.

[85] Ivars Peterson, *Playing Your Cards Right: Poker Comes Out of the Back Room and Into the Computer Science Lab*, 154 SCI. NEWS 40, 40 (1998).

[86] PACO HOPE & SEAN MCCULLOCH, STATISTICAL ANALYSIS OF TEXAS HOLD 'Em 5 (2009).

that 50.3% of the hands that did end in a showdown were not won by the player with the best hand (because the stronger hand had folded before the showdown).[87] The implication of these statistics is that the games' final results are not determined by the cards (the element of chance), but rather the decisions the players made (the skill).

Poker is a game of incomplete information because players do not know which cards their opponents hold or which cards will be dealt in the flop, turn, and river.[88] However, because it is played with a deck of 52 cards, there are a limited number of possibilities. Therefore, the probabilities of making each type of hand can be calculated.[89] The probabilities of making these hands change each time more cards are dealt. To use an example from Anthony Cabot, Esq. and Professor Robert Hannum, a player has a 1 in 509 chance of making a flush before any cards are dealt.[90] If the player is dealt two spades for their hole cards, and there are two spades and a diamond on the flop, the odds against making a flush on the turn card is approximately 4.2 to 1. If the player does not make the flush after the turn card is dealt, the odds against him or her making it on the river is 4.1 to 1. The probability that you will fail to make the flush on either the turn or the river is 1.86 to 1.[91] This kind of analysis can be utilized by skillful players to help them determine the probability of forming a certain hand for both themselves and for their opponents (who they might guess based on the community cards and their betting strategy was trying to make a certain hand), guiding the other decisions the player makes during the course of the game.

The probability of poker hands is only one of the factors that can influence the outcome of a hand. Using opponent modeling, players can categorize the type of play of their opponents (for example: their level of skill, whether they are a passive or aggressive bettor, whether they play a lot or relatively few hands) and then use that categorization to exploit the opponents' weaknesses.[92] Players can defend themselves against opponent modeling by being unpredictable, changing their style of

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[87] *Id.*

[88] Cabot, Light, & Rutledge, *supra* note 41, at 396-98l; Peterson, *supra* note 85, at 40.

[89] For a chart listing the probability of making each type of hand, see Cabot & Hannum, *supra* note 19, at 472.

[90] *Id.*

[91] *Id.* at 474.

[92] Peterson, *supra* note 85, at 40.

play, and making random decisions in order to mislead opponents into categorizing one's style of play incorrectly.[93]

Another skill players may utilize is betting strategy. Players can use wagers to try to influence another player's decision to call, raise, or fold a hand. For instance, players can make it uneconomical for their opponents to call or raise, or can give them information (possibly false) about the strength of their hand.[94] An important factor in betting strategy is a player's position at the table, which determines the order in which the bets are placed.[95] A player betting later will have more information about the other players' hands based on their opponents' decisions, which could be combined with other information, such as knowledge of the opponent's playing type and betting habits, to better predict the opponents' hands.[96]

One betting strategy commonly employed by skillful players is bluffing. The basic concept of bluffing is that a player bets aggressively in order to give opponents the impression that he or she has a strong hand, when in fact the player does not, in the hope that this will entice opponents to fold. However, this form of bluffing can be too predictable when playing skilled opponents, so experienced poker players may employ a form of bluffing known as the post oak bluff.[97] In this type of bluff a player bets a small amount, giving opponents the impression that the player is trying to make them call because the player has a strong hand. The opponents will think the player is trying to make them call, and rather than falling into that trap, the opponents will fold, when in actuality the player did not have a strong hand.[98] This strategy would be most effective in a situation where the opponent has modeled the player as one who makes small bets when they have strong hands. This is an example of how the different skills a player utilizes interact with one another. The various skills used in poker support the argument that poker is a game of skill, not a game of chance.

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[93] *See id.*; Alon, *supra* note 84, at 9-10.

[94] United States v. Dicristina, 886 F. Supp. 2d 164, 174-75 (E.D.N.Y. 2012), *rev'd*, 726 F.3d 92 (2d Cir. 2013).

[95] Note that the order of betting on any given hand can be considered an element of chance, although the order of betting does rotate with each hand.

[96] However, there are players who prefer to play up front (meaning they prefer to bet earlier rather than later in the betting order). *See Dicristina*, 886 F. Supp. 2d at 175; Alon *supra* note 84, at 11-13.

[97] *Dicristina*, 886 F. Supp. 2d at 174-75.

[98] *Id.*

Whether poker is a game of skill or chance, and how that is determined, varies depending on the applicable state law. State law varies greatly in how it defines the element of chance in a gambling game. Because state law is so nuanced, it would make sense that Congress deferred to state law in § 1955(b)(1) when it defined an "illegal gambling business" as one which operated in violation of state law. Further, it does not seem likely that Congress adopted one of the various definitions of gambling in § 1955(b)(2) without any discussion of which definition it was adopting. It also is in keeping with the history of federal regulation of gambling to defer to the states for the substantive definition of gambling rather than adopt a federal definition. With respect to the IGBA, this reading fits with Congress's intent because the motivation behind the legislation was to aid the states where they have failed to enforce their own anti-gambling law, not for the federal government to take charge in the efforts to define illegal gambling.[99]

II. THE FEDERAL GOVERNMENT'S ROLE IN REGULATING GAMBLING

Traditionally, gambling has been an area largely left to the states to regulate.[100] The federal government has only gotten involved in the regulation of gambling when it had reason to believe the states alone could not adequately enforce their own gambling laws.[101] Early federal gambling law in the nineteenth century focused on the governance of lotteries, and not much else.[102] These anti-lottery laws were often early battlegrounds for shaping the concept of federalism during a time when expansion of the federal government's powers was much

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[99] *See infra* Part III.

[100] *See* Blakey & Kurland, *supra* note 1, at 925.

[101] *Id.* at 926.

> The earliest congressional concern arose in response to the inability of states acting alone to control the perceived abuses of the nineteenth century state-chartered lotteries. Subsequent federal gambling legislation has manifested a variety of policies that include depriving organized crime of its gambling revenue, harmonizing federal gambling taxes with diverse state gambling policies, and developing a coherent gambling policy to govern federal enclaves.

[102] *See id.* at 927-43 (discussing federal regulation of lotteries in the 19th century and at the turn of the century); I. Nelson Rose, *Gambling and the Law®: The Third Wave of Legal Gambling*, 17 VILL. SPORTS & ENT. L.J. 361, 370, 374 (2010) [hereinafter Rose, *Third Wave*] (discussing the first federal anti-gambling laws, describing them as weak due to the view of the federal government as not having much power, and discussing the use of the commerce clause in the late 19th century).

contested.[103] In the early twentieth century, Congress "virtually abstain[ed]" from regulating gambling, though it did prohibit broadcasting lottery advertisements in the Federal Communications Act of 1934.[104] Congress also began to regulate commodities futures, which was then considered a form of gambling.[105] After this hiatus, the federal government once again began a period of legislative activity starting in 1950 with the Kefauver Committee.[106] With this new period of activity the federal government had a new reason for involving itself with gambling—the connection between gambling and organized crime.[107] During this time, the federal government was mindful that the regulation of gambling was still mainly within the purview of the states, and sought to aid the states in curbing illegal gambling where organized crime created unique problems for state and local governments. The federal government did not seek to substantively define gambling. Instead, its primary aim was to help the states enforce their own gambling laws. Because the history of the federal regulation of gambling is a story about federalism, it is through this lens that federal legislation concerning gambling, including the IGBA, should be viewed.

A. Federalism and the Lottery

The first period of federal regulation concerning gambling focused primarily on lotteries. Lotteries were widespread in the colonial era and post-Revolutionary war, as they were an easy way for both governments and private individuals to raise capital.[108] Beginning in the 1820s and

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[103] *See, e.g.*, Champion v. Ames, 188 U.S. 321 (1903); NAT'L INST. OF LAW ENFORCEMENT & CRIM. JUSTICE, U.S. DEPT. OF JUSTICE, DEVELOPMENT OF THE LAW OF GAMBLING 1776–1976, at 497-99 (1977) (listing constitutional provisions which became the center of debate in anti-lottery legislation, both in Congress and in the courts); John Dinan, *The State Constitutional Tradition and the Formation of Virtuous Citizens*, 72 TEMP. L. REV. 619, 648 (1999) ("Each of these cases [*Cohens v. Virginia* and *Champion v. Ames*], however, dealt more with the relationship between the federal and state governments than with the issue of gambling per se.").

[104] Blakey & Kurland, *supra* note 1, at 946, 958 n.138.

[105] *Id.* at 958 n.138. Congress passed the Future Trading Act in 1921, which was later declared unconstitutional. Congress then passed the Commodity Exchange Act in 1936. *Id.*

[106] NAT'L INST. OF LAW ENFORCEMENT & CRIM. JUSTICE, *supra* note 103, at 562-63. The Kefauver Committee, led by Senator Kefauver, was formally known as the Senate Special Committee to Investigate Crime in Interstate Commerce. *Id.* at 562 n.60.

[107] *See id.* at 562-64.

[108] Rose, *Third Wave*, *supra* note 102, at 368-70 (describing this period as the 'first wave' of legalized gambling); Dinan, *supra* note 103, at 649.

1830s, public sentiment had turned against lotteries due to the exposure of corruption and scandal in lotteries.[109] The reaction was a wave of state legislation and state constitutional amendments banning lotteries; by 1862, all but two states, Missouri and Kentucky, had banned them.[110] But after the Civil War, some Southern states legalized lotteries to raise funds to rebuild.[111] Even though many states had banned lotteries within their borders, they could not keep other states from selling their residents lottery tickets through the mail, since regulation of the mail was under federal jurisdiction.[112] To solve this problem, Congress passed legislation in 1868 that prohibited mailing lottery offers through the U.S. Post Office.[113] The law was amended in 1876, and among the alterations was the deletion of the word "illegal," which had the effect of prohibiting the mailing of all lottery-related papers, including those legal under state laws.[114] This provision was controversial when debated by the Senate, as Senators argued that the legality of lotteries was the prerogative of the states.[115] The law was upheld as constitutional in *Ex parte Jackson*, but the Supreme Court avoided the federalism question by focusing on the power of the federal government to regulate the U.S. Post Office rather than the intrusion on states' power, ignoring the 10th Amendment argument before the Court.[116]

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[109] Rose, *Third Wave*, *supra* note 102, at 369-70; Dinan, *supra* note 103, at 649.

[110] Rose, *Third Wave*, *supra* note 102, at 369-70; For a discussion of the Supreme Court's involvement and interpretation of the Contract Clause regarding these state law prohibitions, see Blakey & Kurland, *supra* note 1, at 929-31.

[111] James J. Devitt, *Legal History: The Louisiana Lottery*, 55 LA. B.J. 346 (2008). Some of the states that legalized lotteries in the antebellum period included Louisiana, Kentucky, Alabama, Georgia, and Mississippi. *Id.* It seems that there was another wave of anti-lottery sentiment following that period, because "[b]y the end of the [19th] century, 35 states had prohibitions against lotteries in their constitutions and no state permitted lotteries again until 1963." *Id.*

[112] Blakey & Kurland, *supra* note 1, at 931. When other state chartered lotteries sold tickets through the mail to residents of states that had banned lotteries, the anti-lottery states could only enforce their laws by going after the in-state consumers, since they had no jurisdiction over the other states or the mail system. Enforcing their laws by going after the purchasers of the lottery tickets proved "difficult, expensive, and unpopular." *Id.*

[113] NAT'L INST. OF LAW ENFORCEMENT & CRIM. JUSTICE, *supra* note 103, at 501-03 (citing Act of July 27, 1868, 15 Stat. 194, codified as amended at 18 U.S.C. § 1302 (2012)). This law was difficult to enforce in practice because the post office could not open letters due to Fourth Amendment protections, and employees were not allowed to delay mail. *See id.* at 503.

[114] Blakey & Kurland, *supra* note 1, at 933.

[115] NAT'L INST. OF LAW ENFORCEMENT & CRIM. JUSTICE, *supra* note 103, at 505-06 n.11.

[116] *Id.* at 506-08.

Despite the law being upheld, some state-operated lotteries sold tickets through the postal system in open violation of the federal law, because enforcement was ineffective.[117] Of these, the biggest problem for states that prohibited lotteries was the Louisiana Lottery, dubbed the "Serpent."[118] The Louisiana legislature allegedly accepted bribes in return for authorizing the lottery and giving it tax exemptions.[119] Over 90% of the lottery's revenue came from interstate sales.[120] Other states were powerless to stop the sale of these tickets in their own states, and pressure mounted on Congress to take action.[121] President Harrison addressed Congress about the issue and urged federal legislation to help the states who could not control the effect another state's action had on their own constituents.[122] In 1890, Congress responded and amended the earlier law by broadening the definition of prohibited material, extending the prohibition to newspapers, and authorizing the post office to detain letters they suspected solicited lottery ticket sales.[123] This 1890 Act was the product of "fifteen years of congressional debate" about the role of the federal government and the protection of states' rights.[124] Opponents of the legislation argued that it was the states' prerogative to legislate on moral issues, and that the federal government should not be able to undermine that legislation by criminalizing activities that were legal under state law.[125] Proponents countered that states that prohibited lotteries were unable to protect themselves from the Louisiana Lottery. Those states needed federal legislation because they did not have the power to regulate the postal system or interstate commerce, and had done what they could within their jurisdiction to no avail.[126] Ultimately, because the states were unable to control the ill-effects of the Louisiana Lottery on their states without the

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[117] Blakey & Kurland, *supra* note 1, at 935-36.

[118] Devitt, *supra* note 111, at 346.

[119] NAT'L INST. OF LAW ENFORCEMENT & CRIM. JUSTICE, *supra* note 103, at 512 n.24 ("The ease with which these measures were passed seem [sic] to justify the repeated claim that the company controlled every Louisiana legislature from 1868 to 1982"); Rose, *Third Wave*, *supra* note 102, at 371.

[120] Devitt, *supra* note 111, at 346.

[121] Rose, *Third Wave*, *supra* note 102, at 372; NAT'L INST. OF LAW ENFORCEMENT & CRIM. JUSTICE, *supra* note 103, at 513-14.

[122] NAT'L INST. OF LAW ENFORCEMENT AND CRIM. JUSTICE, *supra* note 103, at 514-15.

[123] Blakey & Kurland, *supra* note 1, at 938-39 (citing Act of September 19, 1890, ch. 908, § 2, 26 Stat. 465, codified as amended at 18 U.S.C. § 1302 (2012)).

[124] NAT'L INST. OF LAW ENFORCEMENT & CRIM. JUSTICE, *supra* note 103, at 515-19.

[125] *Id.* at 518 n.39. Opponents were also concerned that the extension of the prohibition to newspapers threatened the freedom of the press. *Id.* at 513 n.29.

[126] *Id.* at 518 n.38.

federal government's assistance, Congress passed the legislation.[127]

The 1890 amendments hurt the business of the Louisiana Lottery, and in 1892 the Louisiana legislature prohibited the further sale of lottery tickets.[128] It seemed that the federal role in regulating the lotteries should have been finished. But the Louisiana Lottery moved its operation to Honduras, where it was able to reach its U.S. customers through Florida, without using the postal system and violating federal law.[129] To reach the Louisiana Lottery's operations, Congress in 1895 relied on its commerce clause power to pass 18 U.S.C. § 1301. The new law prohibited use of interstate or foreign commerce to bring lottery-related instruments into the United States.[130] This was a novel and controversial use of the commerce clause power, which the Supreme Court upheld in *Champion v. Ames* in 1903.[131]

In the second half of the twentieth century, states began to legalize lotteries.[132] The federal laws that helped states keep the Louisiana Lottery out of their borders were now hindering the growing number of states that had legalized lotteries.[133] The U.S. Department of Justice was ready to prosecute those states for violation of federal anti-lottery laws, but Congress passed legislation that exempted state-run lotteries from federal law.[134] This exception was narrowly tailored to exempt only state-conducted lotteries authorized by state law when they were acting within their state.[135] The exemption excluded those states that had authorized lotteries, while continuing to enforce the law with respect to those states that remained anti-lottery.[136]

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[127] *Id.*

[128] Rose, *Third Wave*, *supra* note 102, at 373. This law did not take effect until December 31, 1893. *See id.*

[129] *Id.* at 373-74.

[130] *See*, 18 U.S.C. § 1301 (2012).

[131] Rose, *Third Wave*, *supra* note 102, at 374 (citing Champion v. Ames, 188 U.S. 321 (1903)).

[132] Blakey & Kurland, *supra* note 1, at 950 ("By 1978, fourteen states had authorized lotteries."). The trend continued: in the 1980s seventeen states and the District of Columbia legalized lotteries, and six more states did so in the 1990s. MASON & NELSON, *supra* note 19, at 9.

[133] DEVELOPMENT OF THE LAW OF GAMBLING, *supra* note 90, at 540.

[134] Blakey & Kurland, *supra* note 1, at 952 (citing Act of Jan. 2, 1975, Pub. L. No. 93-583, 88 Stat. 1916 (1890) (codified at 18 U.S.C. § 1307 (2012)).

[135] For a discussion of the specific exemptions, and the inconsistencies and problems the exemptions created, see NAT'L INST. OF LAW ENFORCEMENT & CRIM. JUSTICE, *supra* note 103, at 545-58.

[136] Blakey & Kurland, *supra* note 1, at 953-54.

The history of federal regulation of lotteries shows Congress's recognition that lotteries are normally an area of the law left to the states. However, when the states were unable to enforce their own gambling policies due to action outside the state, the federal government got involved. In the case of lotteries, the federal government legislated to protect the states from the Louisiana Lottery interrupting the integrity of their anti-lottery stance during a time when the states generally disfavored lotteries.[137] When public opinion had turned to favoring lotteries in the twentieth century, Congress acted to exempt state-run lotteries in recognition of that sentiment.

B. Organized Crime and Federal Regulation of Gambling in the Twentieth Century

The federal government did not involve itself much in the regulation of gambling in the first half of the twentieth century.[138] Beginning in the 1950s, and lasting into the 1970s, the federal government began a foray into governing gambling. Congress legislated during this time because of a growing concern about organized crime as a nationwide problem.[139] It was concerned with organized crime's involvement in gambling, especially because the profits from gambling were the "principal support of big time racketeering and gangsterism."[140] The federal government stepped in to govern gambling when they felt there was a national problem that for various reasons the states alone could not handle. Twentieth century federal regulation regarding gambling was largely enacted during three main time periods: during the Kefauver Committee from 1950-51, under Attorney General Robert F. Kennedy from 1961-62, and under the Nixon Administration from 1969-70.[141]

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[137] Of course, this was at the expense of states such as Louisiana which favored lotteries.

[138] Blakey & Kurland, *supra* note 1, at 958.

[139] NAT'L INST. OF LAW ENFORCEMENT & CRIM. JUSTICE, *supra* note 103, at 560.

[140] ORGANIZED CRIME AND LAW ENFORCEMENT: THE REPORTS, RESEARCH STUDIES AND MODEL STATUTES AND COMMENTARIES PREPARED FOR THE AMERICAN BAR ASSOCIATION COMMISSION ON ORGANIZED CRIME VOL. I, at 13 (Morris Ploscowe, ed., Grosby Press 1952) [hereinafter ORGANIZED CRIME AND LAW ENFORCEMENT].

[141] Blakey & Kurland, *supra* note 1, at 959. The efforts under the Nixon Administration, namely the IGBA, will be discussed *infra* Part III.

1. The Kefauver Committee

Before 1950, nationwide efforts to study organized crime consisted solely of the knowledge gained by the National Commission on Law Observance and Enforcement, a Prohibition-era look into bootlegging.[142] In 1949, President Truman began to issue public statements that focused national attention on organized crime, and the FBI was asked to report on crime nationwide, adding to the attention.[143] In February 1950, the Attorney General's Conference on Organized Crime further illuminated the problem of organized crime.[144]

These events led to the formation of the Special Senate Committee to Investigate Organized Crime in 1950, the first extensive national effort to study the problem of organized crime.[145] It became known as the Kefauver Committee, after Senator Estes Kefauver, who headed the committee.[146] The Kefauver Committee held hearings in 14 cities across the U.S., which were widely publicized and even broadcast on television.[147] The Kefauver Committee brought the problem of organized crime onto the national stage, where it remained for the next few decades. Although the Kefauver Committee only immediately resulted in the Johnson Act being passed, its various proposals and factual findings became the basis for much of the gambling legislation passed in the coming years.[148]

The Kefauver Committee found that gambling was the major source of revenue for organized crime, and that gambling profits supplied the capital for organized crime's other ventures.[149] The Committee found that illegal gambling was

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[142] ORGANIZED CRIME & LAW ENFORCEMENT, *supra* note 140, at 10.

[143] NAT'L INST. OF LAW ENFORCEMENT AND CRIM. JUSTICE, *supra* note 103, at 563 n.61.

[144] *Id.* at 562.

[145] *Id.*; ORGANIZED CRIME & LAW ENFORCEMENT, *supra* note 140, at 1-2, 9-10 (containing the reports authorized by, and the suggestions of, the American Bar Association's Commission on Organized Crime, which was created to cooperate with the federal efforts of the Kefauver Committee).

[146] NAT'L INST. OF LAW ENFORCEMENT & CRIM. JUSTICE, *supra* note 103, at 562 n.60.

[147] NAT'L INST. OF LAW ENFORCEMENT AND CRIM. JUSTICE, *supra* note 103, at 563 n.61. Those fourteen cities are: Washington D.C., Miami, Tampa, New Orleans, Kansas City, Cleveland, St. Louis, Detroit, Los Angeles, San Francisco, Las Vegas, Philadelphia, Chicago, and New York.

[148] The Johnson Act prohibits the transportation of gambling devices in interstate channels. *Id.* at 564.

[149] *Id.* at 562; ORGANIZED CRIME AND LAW ENFORCEMENT, *supra* note 140, at 9-10 (This source summarized the findings of the Kefauver Committee, and since it is a contemporaneous source connected with the Kefauver Committee which summarized

mostly controlled by organized crime,[150] and that illegal gambling thrived in many big and small cities, including the 14 cities where the Committee held hearings.[151] Given these findings, it seemed necessary for the federal government to attack illegal gambling if it wanted to weaken the influence of organized crime. The Committee was mindful, however, that anti-gambling laws traditionally fell under state and local jurisdiction.[152] One of the Committee reports recognized as much when it stated:

> While channels of interstate communication and interstate commerce may be used by organized criminal gangs and syndicates, their activities are in large measure violations of local criminal statutes. When criminal gangs and syndicates engage in bookmaking operations, operate gambling casinos or slot machines, engage in policy operation, peddle narcotics, operate house[s] of prostitution, use intimidation or violence to secure monopoly in any area of commercial activity, commit assaults and murder to eliminate competition; they are guilty of violating State laws and it is upon State and local prosecuting agencies, police and courts that the major responsibility for the detection, apprehension, prosecution and punishment of offenders rests.[153]

In the resulting legislation from both the Kefauver Committee and later legislative efforts that built on it, the federal government attacked illegal gambling where it had jurisdiction to do so—where the illegal gambling intersected with interstate commerce. The federal government had to step into an area traditionally reserved to the states because only it had the jurisdiction to do so. Congress also sought to enforce federal laws in cases where the state and local law enforcement failed to do so, for various reasons such as apathy, corruption, and lack of resources.[154]

The Kefauver Committee found that organized crime used the channels of interstate commerce to further its gambling operations.[155] For example, modes of interstate communication such as telephone and wire services were an integral part of illegal bookmaking (the practice of taking

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the Kefauver Committee's findings from the Committee's own reports, this source will be used as the equivalent of the Kefauver Committee's findings).

[150] Paul Bauman & Rufus King, *A Critical Analysis of the Gambling Laws*, *in* ORGANIZED CRIME AND LAW ENFORCEMENT, *supra* note 140, at 73.

[151] ORGANIZED CRIME AND LAW ENFORCEMENT, *supra* note 140, at 11-12.

[152] *Id.* at 22.

[153] *Id.* at 22-23 (quoting page 6 of a Kefauver Committee report).

[154] *Id.* at 15-17.

[155] *Id.* at 14.

wagers on competitions, usually sporting events such as horse or dog races, football, and basketball).[156] In bookmaking, interstate communication was often used to place and receive wagers, as well as obtain information regarding the competitions being wagered upon.[157]

State laws were ineffective in curbing illegal bookmaking because when they prohibited the communication of bets and wagers, bookmaking operations were able to conduct their enterprises using out-of-state communication.[158] For example, California and Florida only had limited success when they prohibited the transfer of information used for illegal bookmaking because the bookmaking operations were able to get their information from out-of-state sources.[159] The Kefauver Committee introduced two different bills to deal with this problem, neither of which passed. One, S. 1564, would have prohibited the transmission through interstate commerce of information on sporting contests gained through means that did not have the consent of the owner.[160] The other, S. 1624, would have criminalized the transmission of wagers over interstate communication.[161]

The Kefauver Committee recognized that organized crime also used interstate commerce for the distribution of gambling devices, most significantly slot machines and punchboards.[162] To this end, in 1951 Congress passed the Johnson Act,[163] which prohibits the transportation of gambling devices over state lines.[164] An objection to this law based on the fear that it would infringe upon states' rights, led by one of Nevada's Congressmen, was allayed due to a provision which allowed the states to pass a law exempting themselves from the Johnson Act.[165] This was in keeping with the purpose of the Johnson Act, "to support the policy of those States which outlaw slot machines and similar gambling devices, by

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156 *Id.* at 14-15.

157 *Id.*, at 14-15.

158 *Id.* at 44-45.

159 *Id.*

160 *Id.* at 45-46. The bill states that when gambling entities were prohibited from the race tracks, they found other ways of stealing the information, such as setting up observation posts overlooking the track and relaying the information from there. *See id.*

161 *Id.* at 46-47.

162 ORGANIZED CRIME AND LAW ENFORCEMENT, *supra* note 140, at 15.

163 *See* Johnson Act, ch. 1194, 64 Stat. 1134 (1951) (codified as amended at 15 U.S.C. §§ 1171-1178 (2012)).

164 15 U.S.C. § 1172.

165 NAT'L INST. OF LAW ENFORCEMENT & CRIM. JUSTICE, *supra* note 103, at 565-66; *see also* 15 U.S.C. § 1172.

prohibiting the use of the channels of interstate or foreign commerce for the shipment of such machines or devices into such States."[166] Like the anti-lottery laws and the Wire Act, Congress was able to achieve this goal while leaving room for the states that wished to legalize the prohibited form of gambling to do so.[167]

The inability of states to reach gambling enterprises operating in interstate commerce was not the sole reason the states could not handle the problem of organized crime's involvement in gambling without federal aid. The Kefauver Committee thought of organized crime as a nationwide organization, and therefore a uniquely national problem.[168] The large geographical scope of organized crime created problems of overlapping jurisdiction for local and state law enforcement.[169] The Committee found that law enforcement agencies with overlapping jurisdictions often passed responsibility to one another in order to evade that responsibility and the lack of centralized coordination allowed that practice to continue without accountability.[170] This problem was compounded by the corruption of local and state officials. The Kefauver Committee found that illegal gambling flourished in certain areas because the officials in that area were corrupt.[171] Law enforcement officials were often bribed to look the other way.[172] The Committee also found that organized crime leaders had enough political clout to put their own members into official positions or get elected officials to work for them.[173] The corruption of local and state governments was a major factor in the federal government's intervention.

2. Attorney General Robert F. Kennedy

The second period of the federal government's active involvement in legislating gambling was in the early 1960s under Attorney General Robert F. Kennedy. In 1961, Congress passed the Wire Act, with provisions similar to the bill S. 1624, which was proposed but not passed during the Kefauver

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166 NAT'L INST. OF LAW ENFORCEMENT & CRIM. JUSTICE, *supra* note 103, at 564 (quoting H.R. Rep. No. 81-2769, at 2 (1950)).

167 For a discussion of the Wire Act, *see infra* Part II.B.2.

168 ORGANIZED CRIME AND LAW ENFORCEMENT, *supra* note 140, at 11.

169 *Id.* at 16.

170 *Id.* (quoting page 183 of the Committee's third interim report).

171 *Id.* at 15.

172 *Id.* at 16-17.

173 *Id.* at 17.

Committee period.[174] Like the Kefauver Committee before them, Robert Kennedy and the Congress that enacted the Wire Act were concerned with the regulation of gambling because of the revelation that gambling was a major source of revenue for organized crime.[175] The Wire Act's purpose was to weaken that source of illegal revenue by prohibiting the use of a "wire communication facility for the transmission in interstate or foreign commerce" of a wager, information pertaining to a wager, or information that entitles one to receive money as the result of a wager.[176] Also like the Kefauver Committee, Congress recognized that it was within the states' power to legalize gambling, and included an exemption that read:

> Nothing in this section shall be construed to prevent . . . the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.[177]

This exemption is similar to the exemption made in the anti-lottery laws in that it retains the states' power to legalize the form of gambling prohibited while keeping in place the federal law that reinforces the laws of those states that have chosen to prohibit that form of gambling. In this way the law fulfills its legislative purpose of aiding the states in enforcing their anti-gambling laws, without interfering with the rights of other states to legalize gambling.[178]

With Robert Kennedy's urging, Congress passed two more pieces of legislation under the commerce clause power. The Travel Act prohibits traveling in interstate commerce with the intent to further unlawful activity.[179] Unlawful activity is further defined to include gambling enterprises, as well as other activities closely associated with organized crime, such as bootlegging, narcotics trafficking, bribery, and extortion.[180] The other piece of legislation, 18 U.S.C. § 1953, prohibits the interstate transportation of wagering paraphernalia for the

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[174] *See* Wire Act of Sept. 13, 1961, Pub. L. 87-216, 75 Stat. 491 (1961) (codified as amended at 18 U.S.C. § 1084 (2012)); *see also supra* Part II.B.1.

[175] *See* Blakey & Kurland, *supra* note 1, at 966 n.173.

[176] 18 U.S.C. § 1084(a). This statute is limited to those who are engaged in a gambling business, and does not apply to those making the bets. Blakey & Kurland, *supra* note 1, at 966.

[177] 18 U.S.C. § 1084(b).

[178] NAT'L INST. OF LAW ENFORCEMENT & CRIM. JUSTICE, *supra* note 103, at 570-71.

[179] 18 U.S.C. § 1952.

[180] *Id.* § 1952(b).

purposes of bookmaking, wagering pools, or numbers games.[181] The statute, in keeping with the Wire Act and other federal legislation, exempts the transportation of materials into states where pari-mutuel (typically horse races) or sports betting is legal.[182] In 1975, Congress amended § 1953 to exempt state-run lotteries, the parallel to the exemption created for the anti-lottery laws.[183]

In sum, many of the issues that made state enforcement of their own gambling laws inadequate continued to be problematic throughout the 1960s and 1970s. In the nineteenth century the federal government regulated lotteries because they had become a national problem and the states were unable to enforce their anti-lottery laws. Likewise, in the twentieth century the federal government legislated with regard to gambling because of the growing national problem of organized crime and the inability of the states to combat this problem alone. The history of federal involvement in gambling shows that the federal government was not interested in defining illegal gambling itself but rather left that to the states, exempting from federal law that which was legal under state law. Instead, the purpose of federal action was to aid the states when larger issues made state enforcement of state law ineffective.

III. THE LEGISLATIVE HISTORY OF THE ILLEGAL GAMBLING BUSINESS ACT

The IGBA continued on the same path that the federal government had started on with the Kefauver Commission. The federal government, concerned with the growing problem of organized crime, decided to attack its gambling roots.[184] It was necessary to do so because the states were failing to effectively enforce their own gambling laws.[185] The motivation behind Congressional action was not to usurp state gambling

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[181] *Id.* § 1953. Numbers is alternatively known as policy or *bolita*.

[182] *Id.* § 1953(b). Pari-mutuel betting is a "betting pool in which those who bet on competitors finishing in the first three places share the total amount bet." *Pari-mutuel Definition*, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/pari-mutuel (last visited Jan. 4, 2014).

[183] Blakey & Kurland, *supra* note 1, at 973. Recall that when states began legalizing state lotteries, Congress enacted § 1307, exempting those lotteries from the anti-lottery laws in §§ 1301-1303.

[184] *See* RICHARD NIXON, *Special Message to the Congress on a Program to Combat Organized Crime in America, April 23, 1969*, *in* RICHARD NIXON: 1969: CONTAINING THE PUBLIC MESSAGES, SPEECHES, AND STATEMENTS OF THE PRESIDENT 315, 320 (1971).

[185] 116 CONG. REC. 588-91 (1970) (statement of Sen. McClellan).

regulation, but rather to aid the states in gambling regulation by addressing their shortcomings. A textual analysis of the language of the IGBA supports the argument that Congress did not intend to create a federal substantive definition of gambling.

In 1967, the President's Commission on Law Enforcement and Administration of Justice issued a report called "The Challenge of Crime in a Free Society," which included a chapter discussing organized crime.[186] This influential report cited gambling as the biggest source of revenue for organized crime, deriving money from sources "rang[ing] from lotteries, such as 'numbers' or 'bolita,' to off-track horse betting, bets on sporting events, large dice games and illegal casinos."[187] It also reported that estimates of the annual intake of illegal gambling ranged from seven to fifty billion dollars, with annual profit as high as six to seven billion dollars.[188] The report said that organized crime made money from illegal gambling not only by operating gambling services, but also by receiving payments from those operations which were independent of organized crime, often through intimidation.[189] President Nixon, in a message to Congress in 1969, echoed many of these same findings. He reported the annual gross take of organized crime from illegal gambling to be estimated at anywhere from 20 to 50 billion dollars.[190] He told Congress that illegal gambling, the "wellspring of organized crime's financial reservoir," helped finance the more reprehensible activities of organized crime, such as usury, bribery of police and politicians, narcotics trafficking, and infiltration into legitimate business.[191] Because of this, President Nixon took the position that the effort against organized crime should focus on illegal gambling.[192] In his view, "[g]ambling income is the life line of organized crime. If we can cut it or constrict it, we will be striking close to its heart."[193]

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[186] PRES. COMM. ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967), *available at* https://www.ncjrs.gov/pdffiles1/nij/42.pdf [hereinafter THE CHALLENGE OF CRIME IN A FREE SOCIETY].

[187] *Id.* at 188.

[188] *Id.* at 189.

[189] *Id.* at 188.

[190] NIXON, *supra* note 184, at 316.

[191] *Id.* at 320.

[192] *Id.*

[193] *Id.*

A. The Need for Federal Involvement

Like earlier federal forays into gambling law, the Congress that passed the IGBA recognized that anti-gambling legislation was traditionally the purview of the states. However, the problems organized crime presented called for federal involvement. Chief among these problems were jurisdictional problems, lack of resources on the state and local levels, and the corruption of local and state officials.[194] The IGBA sought to aid the states where they were unable to enforce state gambling law due to these issues. It was the desire to overcome these issues, rather than a desire to define gambling under federal law, that motivated this legislation.

Jurisdictional limitations are one reason that state and local enforcement of gambling laws were unsuccessful. The operation of gambling enterprises across various jurisdictional lines necessitated coordination among more than one law enforcement agency.[195] Unfortunately this cooperation often did not exist, in part due to lack of trust for fear the other law enforcement agency was corrupted by organized crime.[196] Because illegal gambling did not operate within state or local borders, the solution was for Congress to give jurisdiction to the federal government, which is not bound by these jurisdictional limits.[197] This reduced the need for cooperation between possibly corrupt local and state law enforcement, although the Justice department still encouraged cooperation between states and localities.[198]

The IGBA gives the federal government the power to prosecute crimes pursuant to § 1955 under its commerce clause powers.[199] Part A of the IGBA contains a Congressional finding that certain gambling enterprises (those that are operated by five or more persons, are continuously operated for 30 days or more or, have a one-day revenue of $2,000 or more) affect interstate commerce.[200] This eliminates the need for the federal prosecutor to prove any jurisdictional element of the crime other than that the gambling operation meets the requirements of Part A.[201] Placing jurisdiction in the federal government's

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194 116 CONG. REC. 591 (1970) (statement of Sen. McClellan).
195 THE CHALLENGE OF CRIME IN A FREE SOCIETY, *supra* note 186, at 199.
196 *Id.*
197 S. REP. No. 91-617, at 73-74 (1969).
198 NIXON, *supra* note 184, at 317.
199 S. REP. No. 91-617, at 73-74 (1969).
200 116 CONG. REC. 35, 294-95 (1970) (statement of Rep. Poff).
201 *Id.*

hands eased the problem of investigating and prosecuting illegal gambling that crossed jurisdictional boundaries.

Another issue that prevented local and state enforcement agencies from adequately enforcing anti-gambling law was their lack of resources. Investigating and developing a case for prosecution often took a significant amount of time and resources while resulting in a relatively small number of arrests.[202] Experienced state-level prosecutors and investigators often did not stay in their positions for long, which created a lack of expertise.[203] Simply put, the state and local law enforcement "lack[ed] . . . sufficient funds to provide adequate manpower or modern equipment" to enforce anti-gambling laws.[204] Giving the federal government jurisdiction over gambling cases "ma[de] available to assist local efforts the expertise, manpower, and resources of the Federal agencies which under existing Federal anti-gambling statutes have developed high levels of special competence for dealing with gambling and corruption cases."[205] President Nixon supported the Justice Department training investigators, prosecutors, and other professionals at the state and local levels.[206] The resources and manpower of the FBI, as well as other agencies, was one way the federal government got involved to help solve local and state enforcement issues.[207]

The most troubling state and local enforcement issue that led to federal involvement was the corruption of state and local officials. Both President Nixon and members of Congress felt that illegal gambling could only exist in places where there was at least some level of corruption of local officials.[208] Among

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[202] THE CHALLENGE OF CRIME IN A FREE SOCIETY, *supra* note 186, at 199.

[203] *Id.*

[204] 116 CONG. REC. 591 (1970) (statement of Sen. McClellan).

[205] 116 CONG. REC. 35, 295 (1970) (statement of Rep. Poff).

[206] NIXON, *supra* note 184, at 317.

[207] 116 CONG. REC. 591 (1970) (statement of Sen. McClellan).

[208] *See, e.g.*, NIXON, *supra* note 184, at 321 ("For most large scale illegal gambling enterprises to continue operations over any extended period of time, the corruption of corrupt police or local officials is necessary."); *see also Measures Relating to Organized Crime: Hearings before the Subcomm. on Criminal Laws and Procedures of the S. Comm. on the Judiciary*, 91st Cong. 394 (1969) (statement of Will Wilson, Asst. Att'y Gen., Criminal Division, Department of Justice) ("The reason local government generally is not effective in this area is, more often than not, bribery or something like it."); *Organized Crime Control: Hearings before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 91st Cong. 93 (1970) (statement of Sen. McClellan) ("Title VIII provides new tools for curbing both the large-scale gambling operations themselves and the corruption of local officials on which they depend."); S. REP. No. 91-617, at 71 (1969) ("The inevitable companion of flourishing gambling activity, moreover, is the bribery and corruption of local law enforcement officials.").

those corrupted by organized crime were law enforcement officials, prosecutors, politicians, and judges, who "operate[d] as a 'silent conspiracy' in support of organized crime."[209] Organized crime considered "ice money," money used for bribery, as a part of its operating expenses.[210] Often it was the local law enforcement officers who took bribes to look the other way, leaving illegal gambling to operate freely.[211] Accepting bribes was tempting for local law enforcement officers, who were often underpaid.[212] In some places, bribery was not even needed to corrupt local elected officials, who were elected because it was known they would be sympathetic to organized crime.[213]

The corruption of local enforcement officials made local enforcement of gambling law unsuccessful, and also hindered federal enforcement. For example, in one case, the IRS unknowingly cooperated with corrupt local forces, who warned gamblers of the planned raids on their establishments.[214] Organized crime's corruption of local law enforcement and officials "destroy[ed] local law enforcement as an effective weapon against organized crime."[215] The corruption of local enforcement made state and local efforts to enforce gambling law ineffective, and necessitated federal involvement to strike at illegal gambling enterprises and organized crime in general. In fact, the IGBA includes a provision that makes it illegal to conspire to obstruct enforcement of state or local law in order to further an illegal gambling business.[216] The combination of corruption, lack of resources, and lack of jurisdiction convinced the federal government that in order to strike at the heart of organized crime, federal action was needed.

B. Congressional Intent

Congress, when deliberating the IGBA, recognized and respected that gambling was an area of law traditionally

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[209] 116 CONG. REC. 601 (1970) (statement of Sen. Hruska).

[210] 116 CONG. REC. 604 (1970) (statement of Sen. Allott).

[211] *Id.*

[212] *The Federal Effort Against Organized Crime: Hearings Before a Subcomm. of the H. Comm. on Government Operations*, 90th Cong. 43-44 (1967) (statement of Mr. Vinson, Asst. Att'y Gen., Criminal Division, Department of Justice); 116 CONG. REC. 604 (1970) (statement of Sen. Allott).

[213] *Measures Relating to Organized Crime: Hearings before the Subcomm. on Criminal Laws and Procedures of the S. Comm. on the Judiciary*, 91st Cong. 394 (1969) (statement of Will Wilson, Asst. Att'y Gen., Criminal Division, Department of Justice).

[214] S. REP. No. 91-617 at 71-72 (1969).

[215] *Id.* at 71.

[216] 18 U.S.C § 1511 (2012).

reserved to the states. Congress sought to aid the states in the enforcement of their traditional duties, rather than take over the regulation of gambling. As the Senate Committee Report put it,

> The enforcement of criminal laws against gambling and other illegal activities is generally the responsibility of the States and local governments in our Federal system. While the intent of the committee is not to preempt this responsibility, it is its intent to make it possible for the Federal Government to intervene where local and State governments have become, in effect, incapable of law enforcement by reason of the corruption of responsible officials. This limited Federal intervention should serve to reinforce the powers of the States and local governments in our Federal system, rather than to inject the Federal Government into a responsibility traditionally left to the States.[217]

The legislative history echoes this same sentiment in its discussion of the intended role of the federal government with the passage of the IGBA. The new legislation was not intended to preempt local law enforcement, but to expand the forces fighting against illegal gambling and organized crime.[218] Congress was attempting to encourage local enforcement by providing "an impetus for effective and honest local enforcement" and resources to aid it.[219] In fact, Congress took the position that "it is essential that the primary responsibility for enforcement of the gambling and corruption laws remain in the hands of state and local officials."[220] The legislative history shows that Congress was not concerned with making anti-gambling law a primary responsibility for the federal government to define and enforce. Instead, the focus was on helping the states to enforce their existing law when the challenges presented by organized crime made that difficult for the states to achieve unaided.

When deliberating the IGBA, Congress was not preoccupied with defining the meaning of gambling or what legal standard for the element of chance should be adopted, but rather with defining gambling in terms of its influence on interstate commerce. The elements of § 1955(b)(1)(ii) and (iii), requiring the illegal gambling business be conducted by five or

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[217] S. REP. No. 91-617, at 74 (1969).

[218] *Measures Relating to Organized Crime: Hearings before the Subcomm. on Criminal Laws and Procedures of the S. Comm. on the Judiciary*, 91st Cong. 394 (1969) (statement of Sen. McClellan).

[219] 116 CONG. REC. 35, 295 (1970) (statement of Rep. Poff).

[220] *Organized Crime Control: Hearings before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 91st Cong. 105 (1970) (statement of Sen. McClellan).

more persons, and be in continuous operation for 30 or more days or have a gross revenue of $2,000 dollars in a single day, defined an illegal gambling business in a way that brought those enterprises under federal jurisdiction pursuant to the commerce clause.[221] The law was designed to target only gambling enterprises of "major proportions."[222] Debate about the meaning of gambling, therefore, revolved around the size of the gambling rather than the games it covered, or the roles of skill and chance in those games. For example, one congressman was concerned that the IGBA would reach a friendly game of poker.[223] The response from Representative Poff was that the law was designed to only reach business-level gambling enterprises, not casual games.[224] The standards set by § 1955(b)(1)(ii) and (iii) were meant to focus federal efforts on the gambling enterprises which were most important, and therefore of utmost national concern.[225] As one Senator explained,

> The approach of this bill is to define an 'illegal gambling business' in terms of the number of people involved and in terms of gross receipts and length of operation . . . . This is a sound and necessary approach . . . . [It] focuses the attack on the large-scale gambling enterprises which are the bread and butter of organized crime.[226]

Congress sought only to reach the illegal gambling that was influential enough to be brought under its commerce

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[221] 18 U.S.C. § 1955.

[222] S. REP. No. 91-617, at 73 (1969). The Report goes on to state that

> It is anticipated that cases in which this standard [referring to § 1955(b)(1)(iii)] can be met will ordinarily involve business-type gambling operations of considerably greater magnitude that this definition would indicate, however, because it is usually possible to prove only a relatively small proportion of the total operations of a gambling enterprise. Thus, the legislation would in practice not apply to gambling that is sporadic or of insignificant monetary proportions. It will reach only those who prey systematically upon our citizens and whose syndicated operations are so continuous and so substantial as to be a matter of national concern.

[223] 116 CONG. REC. 35, 205 (1970) (statement of Rep. Mivka).

[224] *Id.* (statement of Rep. Poff). It is significant that Representative Poff responded to the concern of whether this statute would criminalize a social game of poker with a statement about the size and character of the gambling operation, not whether poker would be considered gambling under a federal definition of gambling. It emphasizes that Congress intended to define an illegal gambling business, not gambling itself.

[225] *Measures Relating to Organized Crime: Hearings before the Subcomm. on Criminal Laws and Procedures of the S. Comm. on the Judiciary*, 91st Cong. 394 (1969) (statement of Sen. McClellan, Chairman, Subcomm. on Criminal Laws and Procedures).

[226] 116 CONG. REC. 602-03 (1970) (statement of Sen. Yarborough).

clause jurisdiction, and significant enough to deal a blow to organized crime when prosecuted.

C. The Meaning of § 1955(b)(2)

Congress's discussion of defining gambling in terms of the number of people involved, gross intake, and longevity stands in stark contrast to what Congress did not discuss—a federal substantive definition of gambling. In the legislative history there is no discussion of what § 1955(b)(2) means. Recall that § 1955(b)(2) states "'gambling' includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein."[227] In the legislative record, explanations of the crime repeatedly name the three elements found in § 1955(b)(1), without any mention of § 1955(b)(2).[228] In the House, the crime was summarized as "mak[ing] large-scale gambling operations in violation of State law a federal offense," without mention of § 1955(b)(2) adding a federal definitional element to gambling.[229] Even when § 1955(b)(2) was mentioned when summarizing the elements of the crime, Congress did not discuss the section as adding a separate element to the crime.[230] Given the variety of the common law definitions of gambling, and the different ways Congress could chose to define gambling, it seems unlikely that Congress would adopt one of these definitions with no discussion.[231] Keeping in mind that throughout the history of gambling, federal involvement in the regulation of gambling deferred to the states for defining what constituted illegal gambling, it makes sense that Congress intended for gambling to be defined entirely by state law.

Of course it is ultimately the text of the statute rather than the intention of the enacting legislative body that governs. While § 1955(b)(2) may purport to define gambling, what it says is "'gambling' includes but is not limited to" a list of games

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[227] 18 U.S.C. § 1955(b)(2) (2012).

[228] *See Measures Relating to Organized Crime: Hearings Before the Subcomm. on Criminal Laws and Procedures of the S. Comm. on the Judiciary*, 91st Cong. 394 (1969) (statement of Sen. McClellan, Chairman, Subcomm. on Criminal Laws and Procedures); 116 CONG. REC. 601 (1970) (statement of Sen. Hruska); 116 CONG. REC. 35, 196 (1970) (statement of Rep. Celler).

[229] 116 CONG. REC. 35, 327 (1970) (statement of Rep. Randall). Nearly identical language appears at 116 CONG. REC. 35, 197 (1970) (statement of Rep. McCulloch).

[230] S. REP. No. 91-617 at 73, 156 (1969).

[231] *See supra* Part I.

prohibited as gambling.[232] This language indicates Congress's intention to create an illustrative, non-exhaustive list.[233] The court in *United States v. Dicristina* examined this list of games and concluded that, because in all of the games listed chance predominates over skill, § 1955(b)(2) adopts a federal predominance test.[234] But all of these games could also fulfill the material element test, and some of them could fulfill the pure chance test.[235] While the list is illustrative, a categorization of the listed possibilities should not serve as a stand-in for a federal definition of gambling when it is not clear such a definition was intended. A categorization of the listed possibilities should not be made to define the characteristics of all the possibilities, morphing their similarities of the listed games into a substantive definition of gambling, when they could stand for more than one possible definition. Further, the canon of *ejusdem generis*—"where general words follow a specific enumeration of persons or things, the general words should be limited to persons or things similar to those specifically enumerated"—only applies when the statutory meaning is ambiguous, which it is not.[236]

A comparison of the language in § 1955(b)(2) with the list contained in § 1955(e) further supports the argument that § 1955(b)(2) does not adopt a federal substantive definition of gambling. Section 1955(e) states, "[t]his section shall not apply to any bingo game, lottery, or similar game of chance."[237] It is a canon of construction that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[238] In § 1955(e), Congress chose to finish a non-exhaustive list with a term that describes and categorizes other

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[232] 18 U.S.C. § 1955(b)(2) (2012).

[233] United States v. Dicristina, 726 F.3d 92, 99-100 (2d Cir. 2013) (internal citations omitted).

[234] United States v. Dicristina, 886 F. Supp. 2d 164, 229-30 (E.D.N.Y. 2012), *rev'd* 726 F.3d 92 (2d Cir. 2013).

[235] Under the material element test, all of the listed games have chance as a material element in determining the outcome. There are also arguments that bookmaking (as well as beating a bookie) requires skill, which would fulfill the pure chance doctrine. *See* Christopher T. Pickens, *Of Bookies and Brokers: Are Sports Futures Gambling or Investing, and Does It Even Matter?*, 14 GEO. MASON L. REV., 227, 250 (2006); *Dicristina*, 886 F. Supp. 2d at 229 (citing arguments that bookmaking and pool-selling requires substantial skill).

[236] *Dicristina*, 726 F.3d 92 at n.8 (internal quotation and citation omitted).

[237] 18 U.S.C. § 1955(e) (2012).

[238] Russello v. United States, 464 U.S. 16, 23 (1983) (citations omitted) (internal quotation marks omitted).

games that would belong in that list, games that are "similar games of chance."[239] Conversely, § 1955(b)(2) gives an illustrative list but does not categorize the types of games prohibited.

If Congress were adopting a federal definition of gambling in § 1955(b)(2), it would be strange to do so without articulating that definition, especially given the pivotal role that the chance—skill dichotomy plays in determining the legality of a game. The fact that Congress did comment on the role of chance in § 1955(e), but failed to do so in § 1955(b)(2), serves to make that omission in § 1955(b)(2) even more suspect. Clearly Congress was aware that it could typify the games it sought to prohibit by commenting on the role chance played in those games; however, it did not. Additionally, § 1955(e) does not refer to or claim to modify § 1955(b)(2) in any way.[240]

The textual differences between the IGBA and its proposed predecessor, S. 2022, further illustrate the point that the text of § 1955(b)(2) does not create a substantive definition of gambling. That bill read "[a]s used in this section, the term 'illegal gambling business' means betting, lottery, or numbers activity."[241] Representative McCulloch, who introduced the bill, said that the proposed legislation would "give the Federal Government the necessary weapons to attack all of these activities [casino-type gambling, sports bookmaking, off-track betting, bolita, policy, numbers, large dice games] with the exception of illegal casino-type gambling."[242] The bill defines a gambling business as these three types of gambling—betting, lottery, and numbers—and it was interpreted that way by Representative McCulloch.[243] The change of language from S. 2022, defining gambling as meaning those three types of games, to § 1955(b)(2) defining gambling as "includes but is not limited to," is significant. It changes the language from one defining gambling, to a non-exhaustive list that lists some, but not all, of the games that are considered gambling.

The legislative history of the IGBA shows that the main reason for federal interference in the matter of governing

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[239] 18 U.S.C. § 1955(e).

[240] *Dicristina*, 726 F.3d 92 at 100.

[241] 115 CONG. REC. 10, 736 (1969) (S. 2022 read into record). S. 2022 is similar in structure to § 1955. The quoted portion is contained in the equivalent of what is § 1955(b)(1), followed by the equivalent of what became § 1955(b)(1)(i), (ii), and (iii). S. 2022 contains no provision parallel to § 1955(b)(2), rather § 1955(b)(2) and § 1955(b)(1) were condensed into proposed § 1953A(b) (the quoted language).

[242] 115 CONG. REC. 10, 785 (1969) (statement of Rep. McCulloch).

[243] *Id.* It should be noted that lottery and numbers includes policy and *bolita*, and that betting includes bookmaking and off-track betting.

gambling was due to the inability of states and localities to adequately enforce their gambling law. This fits with the history of federal regulation of gambling, when the federal government acted when the states were unable to enforce their anti-lottery policies when challenged by the Louisiana Lottery and when organized crime made corruption, lack of resources, and lack of jurisdiction major factors in the inability of states to enforce gambling law. Congress also recognized the variance in state law regarding the legality of gambling, and did not seek to impose its own federal agenda in place of that variation. Rather, throughout the history of the regulation of gambling, Congress has sought to aid the states when they were incapable of enforcing their own gambling law. With the IGBA, Congress recognized and continued this tradition. Congress did not intend to take over deciding which forms of gaming were prohibited as illegal gambling, but rather to aid the states in enforcing their own definitions of what constituted illegal gambling.

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